



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE TRIAL CHAMBER**SPECIAL TRIBUNAL FOR LEBANON**

Case No: STL-11-01/T/TC

Before: Judge David Re, Presiding
Judge Janet Nosworthy
Judge Micheline Braidy
Judge Walid Akoum, Alternate Judge
Judge Nicola Lettieri, Alternate Judge

Registrar: Mr Daryl Mundis

Date: 30 November 2017

Original language: English

Classification: Public

THE PROSECUTOR

v.

**SALIM JAMIL AYYASH
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA**

**DECISION PARTLY GRANTING THIRD SABRA DEFENCE MOTION
FOR THE ADMISSION OF DOCUMENTS RELATING TO MR AHMED ABU
ADASS – THE FAILED RECRUITMENT OF MR AHMED ABU ADASS**

Office of the Prosecutor:Mr Norman Farrell & Mr Alexander Hugh
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Mr Chad Mair**Legal Representatives of
Participating Victims:**Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra**Counsel for Mr Hassan Habib Merhi:**Mr Mohamed Aouini, Ms Dorothée Le Fraper
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Hassan & Ms Natalie von Wistinghausen**Counsel for Mr Assad Hassan Sabra:**Mr David Young, Mr Geoffrey Roberts
Ms Sarah Bafadhel

INTRODUCTION

1. The amended consolidated indictment pleads that on 14 February 2005, the former Lebanese Prime Minister, Mr Rafik Hariri, was assassinated in an attack in Beirut that killed 21 others and injured 226 people. Shortly thereafter, the Al-Jazeera news network in Beirut received a video featuring Mr Ahmed Abu Adass falsely claiming responsibility for the attack. The Accused, Mr Assad Hassan Sabra, Mr Hussein Hassan Oneissi and Mr Hassan Habib Merhi, participated in identifying and effecting the disappearance of Mr Abu Adass.¹ Specifically, the Prosecution alleges that Mr Oneissi introduced himself to Mr Abu Adass as ‘Mohammed’ at the beginning of January 2005 at the Arab University Mosque of Beirut, also known as the Al-Houry Mosque, and asked Mr Abu Adass to teach him how to pray. They met on several subsequent occasions. On the morning of 16 January 2005, Mr Abu Adass left his home to meet ‘Mohammed’ (allegedly Mr Oneissi). Mr Abu Adass has been missing since that day.²

2. Counsel for Mr Sabra filed six separate motions tendering—under Rule 154 of the Special Tribunal’s Rules of Procedure and Evidence or, in the alternative, under Rules 92 or 165—documents allegedly relevant to the recruitment of Mr Abu Adass and his role in the alleged false claim of responsibility.³

3. On 25 September 2017, the Trial Chamber issued its decision with respect to the first of these motions, admitting 49 documents into evidence and denying the admission into evidence of the remaining 79 documents, including all tendered witness statements and call

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2720, Amended Consolidated Indictment, 12 July 2016 (confidential), paras 3 (b)-(c), 4-5, 23, 44, 48 (c).

² Amended consolidated indictment, paras 23, 28; STL-11-01/PT/PTJ, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1077, Prosecution’s Submission of Updated Pre-Trial Brief pursuant to Rule 91(G)(i) and the Pre-Trial Judge’s Order of 7 August 2013 and Decision of 16 August 2013, 23 August 2013, Annex A – Prosecution’s Updated Pre-Trial Brief, dated 23 August 2013 (confidential) (‘Prosecution Pre-Trial Brief’), para. 122.

³ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3024, Motion for the Admission of Documents Relating to the Claim of Responsibility - Character, religious beliefs and associates of Ahmed Abu Adass with updated annexes, 7 March 2017; F3057, Motion for the Admission of Documents Relating to the Claim of Responsibility - The Selection of Ahmed Abu Adass, 29 March 2017 (confidential); F3109, Motion for the Admission of Documents and Statements Relating to Ahmed Abu Adass - The Failed Recruitment of Ahmed Abu Adass, 28 April 2017 (confidential) (‘Sabra Defence motion’); F3165, Motion for the Admission of Documents and Statements Relating to Ahmed Abu Adass - The Successful Recruitment of Ahmed Abu Adass, 31 May 2017 (confidential); F3205, Motion for the Admission of Documents and Statements Relating to Ahmed Abu Adass - The Video and the Letter: The False Claim of Responsibility, 30 June 2017 (confidential); F3251, Motion for the Admission of Documents Relating to the Claim of Responsibility - The Fax, 26 July 2017 (confidential).

sequence tables.⁴ The Trial Chamber also issued its decision on the second motion, admitting five documents into evidence and denying the admission into evidence of the remaining 60 documents.⁵

4. This decision addresses the third Sabra Defence motion, which tenders 48 documents relevant to the failed recruitment of Mr Abu Adass. The Sabra Defence argues that the tendered documents demonstrate that Mr Abu Adass was not selected at random by Mr Oneissi, as pleaded, but rather that his recruitment had been meticulously prepared since September 2004, well before the mobiles attributed to Mr Oneissi and Mr Sabra were used in ‘the vicinity of’ the Arab University Mosque.⁶

5. Specifically, the Sabra Defence submits that Mr Abu Adass held extremist, radical beliefs and followed the violent ideology of ‘Takfir’ associated with the ‘Dinniyeh group’, a fundamentalist sect.⁷ Mr Abu Adass was closely associated with Mr Ahmed Salim Mikati,⁸ Mr Ahmed Al-Saneh, Mr Khaled Taha, and others who held similar extremist views and were linked to the Dinniyeh group.⁹

⁴ F3337, Decision Granting, in Part, Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass – Character, Religious Beliefs and Associates, 25 September 2017 (‘25 September 2017 decision’). Call data records ‘are so-called metadata [and] provide information about communications, such as the source and destination phone number, the type of communication (phone call or text message), the date and time of phone calls and text messages, the duration of phone calls, the IMEI number of the hand set relevant to the communications, and the cell sectors engaged at the beginning and end of a call’; see STL-11-01/T/AC/AR126.9, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F0007, Decision on Appeal by Counsel for Mr Oneissi Against the Trial Chamber’s Decision on the Legality of the Transfer of Call Data Records, 28 July 2015, para. 3 (internal footnotes omitted). Call sequence tables render the information contained in call data records legible by presenting ‘chronological sequences of calls relating to a particular, or target, telephone number over a specified period of time’; see STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1937, Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIC and STL’s Prosecution, 6 May 2015, para. 2. See also STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2799, Decision on the Prosecution Motions for the Admission of the Call Sequence Tables Related to the Five Colour-Coded Mobile Telephone Groups and Networks, 31 October 2016 (‘Decision on call sequence tables’), para. 3.

⁵ F3439, Decision Partly Granting Second Sabra Defence Motion for the Admission of Documents Relating to Ahmed Abu Adass – The Selection of Ahmed Abu Adass, 30 November 2017 (‘Decision on second Sabra Defence motion’).

⁶ Sabra Defence motion, para. 52.

⁷ According to the Sabra Defence, the Dinniyeh group was affiliated with the ‘Takfir wal Hijari’ fundamentalist sect which attempted to seize control of several villages in northern Lebanon in 1999/2000. The ‘Takfir’ doctrine is a violent fundamentalist ideology. Its followers often label individuals, governments, or societies who do not adhere to their beliefs as being infidels who are susceptible to violence. See 25 September 2017 decision, para. 29, fns 36-37.

⁸ The Sabra Defence refers to both the names ‘Mikati’ and ‘Miqati’ in relation to this person throughout the motion and annexes.

⁹ Sabra Defence motion, paras 8-12, 18.

6. The Sabra Defence contend that there were earlier attempts to assassinate Mr Hariri and to use Mr Abu Adass as part of the plan—both during an attack on the Future TV station in Beirut in June 2003 and in a plot to attack the Italian embassy in Beirut in September 2004. On 15 June 2003, the Future TV station, which was then owned by Mr Hariri, was attacked by a rocket launcher resulting in the destruction of a newsroom. After the attack, a ‘false jihadist’ group claimed responsibility for the attack—similar to that occurring after Mr Hariri’s assassination—warning of future attacks and seemingly suggesting that a new terrorist group had carried out the attack. The attack appeared intended to stop Mr Hariri’s campaign against the extension of Mr Emile Lahoud’s mandate as the Lebanese President. However, almost two years after the attack, a Syrian intelligence officer, Mr Hussein Ahmad Taha, admitted to firing the rockets and to issuing the false claim of responsibility on behalf of an Islamic organisation.¹⁰

7. Similarly, in September 2004, a plot to target Mr Hariri’s convoy in Beirut was mistakenly considered to be a plot against the Italian embassy in Lebanon. The plot involved a large amount of explosives on a truck placed by the side of a road used by Mr Hariri’s convoy traveling between Parliament and his residence, Quraitem Palace. The convoy passed in front of the Italian embassy, as it did on the day Mr Hariri was assassinated on 14 February 2005. Mr Mikati and Mr Ismail Khatib, and ten others allegedly implicated, were arrested in connection with the plot. According to the Sabra Defence, Mr Rustom Ghazaleh, the Chief of the Syrian Military Intelligence in Lebanon at the time, was also demonstrably connected to the Italian embassy plot. This is based on many factors including that the explosive was found near his office in Anjar, near the Lebanese-Syrian border, and that he strategically released suspects who had been arrested in connection with the plot.¹¹

8. Mr Abu Adass worked at the Al Risala publishing house in Beirut. Mr Ahmed Al-Saneh, who had hired him for the job shortly before the failed plot was discovered in September 2004, was also arrested for having allegedly shielded Mr Mikati and paid money to Mr Khatib in connection with the Italian embassy plot. Shortly after Mr Al-Saneh’s arrest, Mr Abu Adass left the publishing house, but people associated with his initial ‘recruitment’ who worked at the publishing house kept in touch with him. After his release from prison, Mr Al-Saneh contacted a mobile used by a friend of Mr Abu Adass, Mr Bilal Zaaroura, on

¹⁰ Sabra Defence motion, paras 39-51.

¹¹ Sabra Defence motion, paras 18-19, 24, 27-28, 34.

20 August 2005 and 23 September 2005. This mobile called the Abu Adass home landline twice on the day of Mr Abu Addas's disappearance on 16 January 2005.¹²

9. Based on all of the above and the similarities in approach between the attack on Future TV, the Italian embassy plot, and Mr Hariri's assassination, the Sabra Defence argues that Mr Abu Adass was initially recruited around the time when the first plot to kill Mr Hariri near the Italian embassy was being prepared and when that plan failed, Mr Abu Adass's 'true recruiters' were forced to bring him back into 'the fold'.¹³

10. Following the Trial Chamber's decision of 25 September 2017, the Prosecution filed a consolidated response to the five outstanding Sabra Defence motions,¹⁴ the Sabra Defence filed a consolidated reply,¹⁵ and the Prosecution filed a consolidated sur-reply.¹⁶ While the Trial Chamber addressed many of these submissions in its decision on the second Sabra Defence motion, this decision deals with only those submissions related to the third Sabra Defence motion.

11. For the reasons below, the Trial Chamber declines to revisit the admissibility of 15 documents previously tendered by the Sabra Defence and denies the admission into evidence of 23 documents it finds to be witness statements tendered in a manner inconsistent with the Rules, and over the Prosecution's objection. The Trial Chamber also denies the admission into evidence of four other documents and exercises its discretion to admit six documents into evidence.

THE LEGAL PRINCIPLES

12. In its previous decisions on the Sabra Defence motions, the Trial Chamber decided the legal principles relevant to the Sabra Defence tendering documents during the Prosecution

¹² Sabra Defence motion, paras 13, 22, 24, 29, 38.

¹³ Sabra Defence motion, paras 52-55.

¹⁴ F3356, Prosecution Consolidated Response to Sabra Defence Evidential Motions Two to Six Relating to Ahmed Abu Adass, 12 October 2017 (confidential) ('Prosecution consolidated response').

¹⁵ F3374, Reply to "Prosecution Consolidated Response to Sabra Defence Evidential Motions Two to Six Relating to Ahmed Abu Adass", 23 October 2017 (confidential) ('Sabra Defence consolidated reply').

¹⁶ F3402, Prosecution Sur-Reply to Sabra Defence Reply to Prosecution Consolidated Response to Sabra Defence Evidential Motions Two to Six Relating to Ahmed Abu Adass, 3 November 2017 (confidential) ('Prosecution consolidated sur-reply').

case—namely, the principles governed by Rules 55 (C), 92, 128, 130 (B), 146 (B), 149 (C)-(D) and (F), 150 (H) and (J), 154-156, 158, 165 and 167.¹⁷

13. The most relevant are the following. The Trial Chamber reiterated that there is no single definition of the term ‘witness statement’ under international criminal law procedural law, as it had previously adopted the broad definition of a witness statement as ‘an account of a person’s knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime’. It found that the Defence should not tender witness statements during the Prosecution case under Rule 154, and that when the Defence is the moving party tendering the evidence of a witness for the truth of its content, the witness properly belongs in the Defence case. The Trial Chamber reiterated that statements tendered under Rule 155 must—with limited exceptions¹⁸—comply with the Rule 155 Practice Direction,¹⁹ which sets out the criteria for admitting witness statements in lieu of oral testimony. The Trial Chamber cannot *proprio motu*²⁰ receive witness statements into evidence under Rule 155, as Rule 155 (C) provides that it must first hear from the parties whether to require the witness to appear for cross-examination. The Defence would be required to request a variation of the Rule 146 (B)²¹ sequence for calling evidence to tender witness statements during the Prosecution case, where the Prosecution objects and seeks to cross-examine the witness.²²

14. With respect to admitting documents other than witness statements during the Prosecution case, the Trial Chamber considered that Rule 146 (B) permits it to vary the sequence of presenting evidence in the interests of justice. As such, in principle and in the exercising of its discretion, the Trial Chamber may admit into evidence, consistent with Rules 149 (C) and (D), documents tendered by the Defence.²³

¹⁷ 25 September 2017 decision, paras 16-25, 79-115, 117, 123; Decision on second Sabra Defence motion, paras 9-13.

¹⁸ See STL-11-01/PT/TC, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F0937, Decision on Compliance with the Practice Direction for the Admissibility of Witness Statements under Rule 155, 30 May 2013, paras 22-31 and, particularly, para. 31; F1280, First Decision on the Prosecution Motion for Admission of Written Statements under Rule 155, 20 December 2013, para. 14.

¹⁹ STL-PD-2010-02, Practice Direction on the Procedure for Taking Depositions Under Rules 123 and 157 and for Taking Witness Statements for Admission in Court Under Rule 155, 15 January 2010.

²⁰ ‘*Proprio motu*’ refers to an action taken on the Trial Chamber’s own initiative.

²¹ Rule 146 (B) provides that ‘[u]nless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence: (i) evidence for the Prosecutor; (ii) evidence called by the Trial Chamber at the request of victims participating in the proceedings; (iii) evidence for the defence; (iv) Prosecutor’s evidence in rebuttal; (v) rebuttal evidence called at the request of victims participating in the proceedings; (vi) defence evidence in rejoinder.’

²² 25 September 2017 decision, paras 79-106; Decision on second Sabra Defence motion, paras 10-12.

²³ 25 September 2017 decision, paras 109-115; Decision on second Sabra Defence motion, para. 13.

THE DOCUMENTS

15. The Sabra Defence tenders 48 documents in its motion. It previously tendered 15 of these 48 documents,²⁴ and the Trial Chamber has ruled on their admissibility in its previous decisions.²⁵ The Sabra Defence should not have tendered (and retendered) these same documents in different filings.²⁶

16. The Sabra Defence characterises the 33 newly tendered documents as 19 statements,²⁷ three call sequence tables,²⁸ one set of United Nations International Independent Investigation (UNIIC) investigator's notes,²⁹ one audio interview,³⁰ one Lebanese Internal Security Forces (ISF) response to a request for assistance by the UNIIC,³¹ three UNIIC internal memoranda,³² two ISF reports,³³ one Lebanese military police report,³⁴ one Lebanese Military Court report,³⁵ and one newspaper article.³⁶

17. The Prosecution characterises the 33 newly tendered documents as 29 witness statements within the meaning of the Rules (the 19 documents identified by the Sabra Defence as statements, the UNIIC investigator's notes, audio interview, the response to the UNIIC request for assistance, three UNIIC internal memoranda, two ISF reports, and Lebanese military police and military court reports), three call sequence tables,³⁷ and one newspaper article.³⁸

²⁴ Sabra Defence motion, annex A, items 12-13, 20-21, 26, 28-29, 31, 33, 36, 38, 42-45.

²⁵ 25 September 2017 decision, addressing items 12, 20-21, 26, 28-29, 31, 33, 36, 42-45; Decision on second Sabra Defence motion, addressing items 13, 38.

²⁶ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3418, Summary Dismissal of Sabra Defence Application for the Admission of 224 Documents, 21 November 2017, paras 5, 8.

²⁷ Sabra Defence motion, annex A, items 2, 7-11, 14, 16-19, 22-23, 27, 32, 37, 39, 46-47. While the Sabra Defence submits that item 2 is a 'Request for Assistance' in the 'Type of Document' column, the 'Title of Document' is listed as 'Statement of Ahmad Issam Al-Saneh'. The Sabra Defence also describes item 2 as a statement in its submissions on indicia of reliability for this item. Sabra Defence motion, annex A, item 2.

²⁸ Sabra Defence motion, annex A, items 3-4, 48. The Sabra Defence does not identify item 4 as a call sequence table in its 'Type of Document' column, but it describes it as an 'extract of call sequence table' in its submissions on indicia of reliability. As noted by the Sabra Defence and analysed in paragraphs 45-46 below, the Trial Chamber has marked for identification the document tendered as item 3 as 5D252 MFI and the document tendered as item 4 as 5D253 MFI.

²⁹ Sabra Defence motion, annex A, item 41.

³⁰ Sabra Defence motion, annex A, item 40.

³¹ Sabra Defence motion, annex A, item 1.

³² Sabra Defence motion, annex A, items 5, 24-25.

³³ Sabra Defence motion, annex A, items 6, 35.

³⁴ Sabra Defence motion, annex A, item 15.

³⁵ Sabra Defence motion, annex A, item 30.

³⁶ Sabra Defence motion, annex A, item 34.

³⁷ The Prosecution submits that item 4 tendered by the Sabra Defence is not a call sequence table, but rather 'selected call records' of contact with a specific phone number. Prosecution consolidated response, annex A,

WITNESS STATEMENTS

Submissions

18. The Sabra Defence characterises many of the tendered documents as ‘statements’. Its arguments are in line with its previous submissions on this issue. Namely it maintains that it is not tendering these statements as ‘witness statements’, but the statements are meant only to undermine the Prosecution case. The witnesses are not Sabra Defence witnesses, and the Prosecution’s inability to cross-examine them goes to the weight the Trial Chamber will give to the tendered documents and not to their admissibility. Should the Trial Chamber decline to admit the tendered documents under Rule 154, it should do so under Rule 92 in accordance with Rule 130, which allow the Trial Chamber to gather evidence that the requesting party demonstrates it is not in a position to collect, or under Rule 165, which empowers the Trial Chamber to produce additional evidence.³⁹

19. The Defence submits that the UNIIC investigator’s notes, the audio interview, the response to the UNIIC request for assistance, three UNIIC internal memoranda, two ISF reports, and the Lebanese military police and military court reports are not witness statements but rather responses to official requests for assistance, documents pertaining to domestic judicial proceedings, and summaries of information provided in documents created outside the course of the proceedings. The Prosecution disclosed these documents to the Defence and the authors of the UNIIC investigator’s notes and two of the UNIIC memoranda are Prosecution investigators, Mr Alasdair Macleod (Witness PRH486) and Mr Paulo Irani (Witness PRH643).⁴⁰

20. The Prosecution argues that the documents identified as ‘statements’, and the UNIIC investigator’s notes, audio interview, response to the UNIIC request for assistance, three UNIIC internal memoranda, two ISF reports, and the Lebanese military police and military court reports are all ‘witness statements’ under the Rules—or documents containing summaries of such statements—and should have been tendered under Rule 155. The documents, however, do not comply with Rule 155 and the Rule 155 Practice Direction governing the admission of witness statements. The witnesses are Sabra Defence witnesses

‘Sabra Motion Three’, item 4. The Trial Chamber will consider this submission further in paragraphs 42-47 below.

³⁸ Prosecution consolidated response, annex A, ‘Sabra Motion Three’, annex C.

³⁹ See Sabra Defence motion, para. 5; Decision on second Sabra Defence motion, paras 20-21.

⁴⁰ Sabra Defence consolidated reply, paras 14-18, annex C, pp. 2-6. Mr Macleod testified in these proceedings.

because the Sabra Defence has conveyed its intention to rely on their statements for the truth of their content and it is irrelevant that the statements were given to agencies other than the Special Tribunal and or created outside the course of the proceedings. The Sabra Defence has not provided any justification to vary the Rule 146 (B) sequence of evidence presentation, as would be required to admit Defence witness statements during the Prosecution case. Furthermore, the Prosecution's preliminary view is that it needs to cross-examine all the witnesses, and the lack of cross-examination goes to the weight of the evidence only after genuine attempts to afford the responding party an opportunity to cross-examine. It is irrelevant that the Prosecution disclosed the statements, and Prosecution employees who summarised or included witness statements in reports are not the providers of the information contained in those statements.⁴¹

Decision

21. The Parties differ as to whether these documents are witness statements under the Rules and whether the witnesses who provided these tendered statements are Sabra Defence witnesses.⁴² While the Sabra Defence maintains that the 19 documents it characterises as 'statements' are not tendered as witness statements, the documents are all statements taken by Prosecution investigators, UNIIC investigators or Lebanese Government officials and recorded in the normal course of investigations.

22. With regard to the additional ten documents which the Prosecution characterises as witness statements, the Trial Chamber considers four to be witness statements. These are the UNIIC investigator's notes,⁴³ the audio interview,⁴⁴ and two of the three UNIIC internal memoranda.⁴⁵ The UNIIC investigator's notes and memoranda are detailed summaries of the words of a witness recorded in interviews conducted in an investigation and therefore are effectively witness statements. The audio interview is a transcript of an interview with Mr Saad Hariri, Mr Rafik Hariri's son and sometime Prime Minister of Lebanon. The Trial Chamber considers this to be a witness statement.

⁴¹ Prosecution consolidated response, paras 12-19, annex A; Prosecution consolidated sur-reply, paras 3-10, 16.

⁴² See paragraph 13 above and Decision on second Sabra Defence motion, para. 11 regarding the legal principles relevant to determining whether a document is a witness statement and whether the witness who gave a statement is a particular Party's witness.

⁴³ Sabra Defence motion, annex A, item 41.

⁴⁴ Sabra Defence motion, annex A, item 40.

⁴⁵ Sabra Defence motion, annex A, items 5, 25.

23. These 23 documents are either statements taken by investigative authorities and recorded during an investigation or documents reciting and or summarising such statements. They are therefore ‘witness statements’ under Rules 155, 156, or 158. The Sabra Defence, however, has improperly tendered these 23 witness statements under Rule 154. The Trial Chamber cannot *proprio motu* receive the witness statements into evidence under Rule 155 (see paragraph 13 above). In any case, it appears that most of the tendered statements fail to comply with the Rule 155 Practice Direction⁴⁶ and many are statements of individuals who are not on any Party’s witness list.⁴⁷

24. As the Sabra Defence has tendered the 23 witness statements for the truth of their content and in support of its case, the evidence of the witnesses in all of the circumstances more appropriately belongs in a Defence case. Relying on the same reasoning as in the first and second decisions referred to above, the Trial Chamber will not exercise its discretion to vary the Rule 146 (B) sequence of the presentation of evidence. The Trial Chamber also is not convinced of any reason in these circumstances or at this point in the proceedings to gather evidence on its own volition under Rule 92 or to exercise its discretion to order the production of additional evidence under Rule 165.

25. The Trial Chamber will therefore deny the admission into evidence of these 23 newly tendered witness statements.

NON-WITNESS STATEMENTS

Response to UNIIC request for assistance

Submissions

26. The Sabra Defence tenders a response to a UNIIC request for assistance signed by the former Lebanese ISF Chief of Information, Mr Wissam Al-Hassan,⁴⁸ regarding the arrest of

⁴⁶ See Prosecution consolidated response, annex C.

⁴⁷ Witness PRH009, Mr Hani Hammoud (Witness PRH052), and Mr Elias El-Murr (Witness PRH001) appear on the Prosecution’s witness list. F1444/A03, Consolidated Witness List, 7 March 2014 (confidential). Witness 009 and Mr Hammoud testified in these proceedings in October 2016 and May 2015, respectively. Regarding the witness statements tendered for Witness 009 (Sabra Defence motion, annex A, item 7), and Mr Hammoud (Sabra Defence motion, annex A, item 14), counsel for Mr Sabra chose not to question the witnesses on the contents of their statements during their testimony. With respect to the witness statement tendered for Mr El-Murr (Sabra Defence motion, annex A, item 9), he appears on the Prosecution witness list but has not testified in these proceedings.

⁴⁸ Mr Wissam Al-Hassan’s name is spelled ‘El-Hassan’ in the response to the UNIIC request for assistance, and by the Parties in their filings. See Sabra Defence motion, annex A, item 1; Prosecution consolidated response, annex C, item 1. The Trial Chamber spelled his name as Mr Wissam Al-Hassan in its decision, F3371, Decision

persons linked to Al Qaeda during September 2004. The response is relevant to show Mr Mikati and Mr Khatib's involvement in the plot against the Italian embassy and to understand the context and circumstances of Mr Abu Adass's first recruitment. It is reliable as it is signed and dated by Mr Al-Hassan, Mr Ashraf Rifi, then the ISF's General Director, and Ms Joyce Tabet, signing for the Prosecutor-General (and now the Special Tribunal's Deputy Prosecutor) and the initial request for assistance is signed and dated by the UNIIC Chief of Investigations.⁴⁹

27. The Prosecution submits that the response to the request for assistance is a witness statement by Mr Al-Hassan and is therefore inadmissible for the same reasons it has provided regarding witness statements (see paragraph 20 above).⁵⁰

Decision

28. Although the response contains statements from Mr Al-Hassan, which relate to biographical and other information about specific individuals, the Trial Chamber does not consider it to be a witness statement from him, but rather a report prepared by Mr Al-Hassan in response to the request for assistance from the UNIIC. It is relevant to the investigation into the failed attack on the Italian embassy and provides context surrounding Mr Abu Adass's alleged prior recruitment. The Trial Chamber finds that it has some probative value in that regard. Moreover, the response to the request for assistance is signed and dated by an ISF official and thus bears sufficient indicia of reliability as an authentic ISF document. The Trial Chamber will therefore exercise its discretion to admit this document into evidence. Its assessment will be a matter of weight.

UNIIC memorandum

Submissions

29. The Sabra Defence tenders a UNIIC internal memorandum authored by Mr Macleod regarding a UNIIC mission to Syria on 9-10 August 2006. The memorandum is probative of and relevant to demonstrate Mr Abu Adass and his associates' 'jihadi motives' and that Mr Abu Adass was easily identified as a person who could credibly claim responsibility for

Admitting into Evidence the Audio Recordings and Transcripts of the Prosecution Interview of Mr Wissam Al-Hassan (Witness PRH680) under Rule 158 and Three Related Documents under Rule 154, 20 October 2017.

⁴⁹ Sabra Defence motion, annex A, item 1.

⁵⁰ Prosecution consolidated response, annex C, item 1.

Mr Hariri's assassination. The memorandum is reliable as it is a UNIIC document signed and dated by UNIIC investigators and disclosed by the Prosecution.⁵¹

30. The Prosecution submits that the UNIIC memorandum is itself a witness statement, as it contains a witness statement from Mr Macleod and various summaries of meetings attached to the investigator's note.⁵² The memorandum is therefore inadmissible for the same reasons it provided for witness statements (see paragraph 20 above).

Decision

31. The UNIIC memorandum is a summary of meetings which Mr Macleod attended in Syria, containing his recommendations. The Trial Chamber does not consider this memorandum to be a witness statement from Mr Macleod, but rather a report he prepared in the course of his mission to Syria, that is, his investigations. In addition, the extracts that the Sabra Defence rely on to support its submissions relate to factual background of the Takfir doctrine associated with the Dinniyeh group (see paragraph 5 above). The Trial Chamber finds it relevant to Mr Abu Adass's disappearance and the false claim of responsibility and it hence has some probative value. As an official United Nations document it also bears sufficient indicia of reliability. The Trial Chamber will therefore exercise its discretion to admit this memorandum into evidence.

Two ISF reports

Submissions

32. The Sabra Defence tenders two reports—the first is a 'summary of information' of the Syrian Military Intelligence in Lebanon dated 18 September 2004 which relates to the arrest of Mr Ahmad Salim Mikati on 17 September 2004. The Defence submits that it is relevant to show Mr Mikati's involvement in the plan to attack the Italian embassy (see paragraph 7 above). The report is reliable as it is a document from the Syrian Military Intelligence and contains information from the ISF, is dated, and was disclosed to the Defence by the Prosecution. The second document is a 60-page file from the Syrian Military Intelligence in Lebanon which includes a file on Mr Mikati. The Defence relies on a number of extracts in the report to demonstrate the involvement of Mr Mikati, Mr Khatib, as well as Mr Al-Saneh in the plot to attack the Italian embassy. The file is reliable as it is signed and dated by the

⁵¹ Sabra Defence motion, annex A, item 24.

⁵² Prosecution consolidated response, annex C, item 24.

head of the Lebanese ISF Information Branch and the head of the Syrian Security and Reconnaissance Branch in Lebanon, and bears the latter's official seal. It was also disclosed to the Defence by the Prosecution.⁵³

33. The Prosecution objects to the admission of both documents, submitting that the first is a witness statement provided by an unidentified source from the ISF Information Branch and that the second document contains multiple witness statements, many of whom are not identified.⁵⁴ It argues that the two documents are therefore inadmissible for the same reasons provided for witness statements (see paragraph 20 above).

Decision

34. In relation to the first report by the Syrian Military Intelligence in Lebanon on Mr Mikati's arrest,⁵⁵ it is generally relevant and probative of the alleged foiled attack on the Italian embassy and to the recruitment of Mr Abu Adass and the false claim of responsibility. The Trial Chamber does not consider it to be a witness statement from an unidentified source but rather a report compiled by the Syrian Military Intelligence. It is an official dated document and bears sufficient indicia of reliability as an authentic Syrian Military Intelligence document. The Trial Chamber will therefore exercise its discretion to admit the report by the Syrian Military Intelligence in Lebanon into evidence. The Trial Chamber will exercise particular care in evaluating its weight.

35. The Syrian Military Intelligence file also contains some summaries of statements by Mr Mikati himself and of other alleged suspects seemingly linked to the Dinniyeh group.⁵⁶ However, the Trial Chamber considers that the summaries were produced in the context of an investigation and not as properly admissible statements from those interviewed. Moreover, the file provides some contextual information surrounding the ISF's investigation into the plot to attack the Italian embassy and possible connections with Mr Hariri's assassination and Mr Abu Adass's recruitment. It also bears an official stamp of the head of the Syrian Security and Reconnaissance Branch in Lebanon and in the absence of any reason to doubt its authenticity, it bears sufficient indicia of reliability. The Trial Chamber will therefore exercise its discretion to admit into evidence the relevant portions tendered by the Sabra Defence of the Syrian Military Intelligence file on Mr Mikati for these limited purposes and not for the

⁵³ Sabra Defence motion, annex A, items 6, 35.

⁵⁴ Prosecution consolidated response, annex C, items 6, 35.

⁵⁵ Sabra Defence motion, annex A, item 6.

⁵⁶ Sabra Defence motion, annex A, item 35.

truth of the content of the witness statements. It too will be carefully evaluated to determine its weight.

Lebanese military police report and military court record

Submissions

36. The Sabra Defence tenders a 44-page report from the Lebanese military police dated 3 October 2005 of which it relies on a one-page extract. The Sabra Defence argues it is relevant to demonstrate an argument between Mr Ghazaleh and Mr Elias Murr, the Minister of Interior of Lebanon, after the arrest of the suspects in the Italian embassy attack (see paragraphs 7 above), and also to Mr Ghazaleh's alleged involvement in the attack. It is signed and dated by the Commander of the Lebanese Military Police, Brigadier General Nabil Ghafari, and bears its official seal and that of the Lebanese Military Public Prosecutor's Office.⁵⁷

37. The Sabra Defence also tenders a Lebanese military court record dated 10 July 2003, which includes information in relation to the arrest of individuals in connection with the attack on the Future TV station (see paragraph 6 above). It submits multiple extracts which are relevant to demonstrate the shared *modus operandi* between the Future TV attack and Mr Hariri's assassination (see paragraph 9 above). It is reliable as it is dated and signed by a military court official, bears multiple official seals, and as it was disclosed by the Prosecution.⁵⁸

38. The Prosecution objects to the admission of both documents, submitting that they both contain multiple witness statements, many of whom are not identified.⁵⁹ It argues that the two documents are therefore inadmissible for the same reasons provided for witness statements (see paragraph 20 above).

Decision

39. The military police report and military court record are dated and signed by a court official. In the absence of any reason to doubt their authenticity or their status as official Lebanese Government documents, the Trial Chamber finds that they bear sufficient indicia of reliability. The one-page extract of the military police report relied upon by the Sabra Defence

⁵⁷ Sabra Defence motion, annex A, item 15.

⁵⁸ Sabra Defence motion, annex A, item 30.

⁵⁹ Prosecution consolidated response, annex C, items 15, 30.

is relevant to Mr Ghazaleh's alleged involvement in the Italian embassy plot and to Mr Abu Adass's recruitment and his role in the false claim of responsibility. However, the rest of the document is extraneous. The Trial Chamber shall exercise its discretion to admit the one-page extract referred to in the Sabra Defence motion and will deny admission of the remainder of the document.⁶⁰

40. The military court record contains multiple extracts of witness statements, however, taken as a whole record, it provides some contextual information surrounding the attack on the Future TV station and potential connections with individuals involved in the assassination of Mr Hariri and in Mr Abu Adass's recruitment. The Trial Chamber considers this to be a borderline compilation of witness statements. However, it shows that the Lebanese judicial and investigating authorities had relevant information on the alleged plot to assassinate Mr Hariri. Therefore it will exercise its discretion to admit into evidence the relevant portions of the Lebanese military court record for these limited purposes and not for the truth of the content of the witness statements.

Call sequence tables

Submissions

41. The Sabra Defence tenders three 'call sequence tables'⁶¹ to demonstrate (i) that Mr Bilal Zaaroura called the Abu Adass home landline on 16 January 2005 and (ii) some of Mr Ahmed Al-Saneh's mobile contacts with Mr Hussam Mohsen on 9 August 2004 and Mr Zaaroura on 20 August and 23 September 2005 (see paragraph 8 above). It submits that the relevance and probative value of these call sequence tables relate to understanding the chronology of events and circumstances surrounding the disappearance of Mr Abu Adass, who appeared to be closely monitored by his close associates, including Mr Zaaroura, suggesting their involvement in facilitating Mr Abu Adass's departure.⁶²

42. The Defence submissions on how it created these documents and regarding their reliability are consistent with its previous submissions. It created these documents by

⁶⁰ Sabra Defence motion, annex A, item 15, ERN 60002155T.

⁶¹ See para. 3, fn 4 above for the Trial Chamber's definition of call sequence tables.

⁶² Sabra Defence motion, annex A, items 3-4, 48; Sabra Defence consolidated reply, annex A, items 3-4, 48. In relation to item 3, exhibit 5D252 MFI, the Sabra Defence notes a formatting error with regard to the columns titled 'A_Number' and 'B_Number' and seeks admission of a corrected version of the call sequence table. Sabra Defence consolidated reply, para. 12.

extracting call data from the Prosecution's 'SQL' database,⁶³ analysing the call data internally, selecting records of interest, identifying fields of relevance, and conducting checks.⁶⁴ The tables are reliable because the Defence created them from call data records obtained by the Prosecution from the Lebanese telecommunications companies Alfa and MTC Touch.⁶⁵ The Defence selected the calls listed in the tables to demonstrate contacts between individuals or to demonstrate the presence of one in a certain area on a particular date. Whether the selected calls are anomalous to the general pattern of usage has no bearing on the *prima facie* reliability of the tables. While the tables include columns titled 'A_Number', 'B_Number', and 'Call_Type' with no explanation, the Trial Chamber heard evidence on the meaning of the relevant terms from Prosecution witnesses in 2015.⁶⁶ The Sabra Defence attributed the relevant mobile numbers to specific individuals on the basis of information contained in other tendered documents, primarily in the tendered witness statements.⁶⁷

43. The Prosecution submits that the tables are inadmissible for the same reasons as in its responses to the previous Sabra Defence motions. The documents are not comprehensive call sequence tables—that is, tables comprising all calls for a particular mobile number over a particular period of time—but rather tables of calls manually selected by the Sabra Defence to advance its case. They include duplicated data, formatting inconsistencies, and headers that are not self-explanatory, all of which could lead to misinterpretation of the data. Duplicating data is a serious flaw that may mislead the reader as it appears to double the call count. Formatting inconsistencies could result in incorrect call counts. While the Trial Chamber has heard evidence on the Prosecution call sequence tables headers, Prosecution witnesses cannot verify the Sabra Defence's correct use of terms and headers. Further, the Defence's attribution of specific mobile numbers to specific individuals by referring to other tendered documents is insufficient, as it does not include the specific, relevant time period of attribution or indicate whether the person identified was the primary or sole user of that number. Even if the numbers could be reliably attributed to specific people, the Defence has failed to demonstrate that any contacts were 'regular'. Finally, the Defence's explanation of its methodology in

⁶³ 'SQL' (Structured Query Language) is a special programming language for databases. The Prosecution's SQL database enables call data record analysis. *See* Decision on call sequence tables, para. 41, fn 87.

⁶⁴ Sabra Defence motion, annex A, items 3-4, 48; Sabra Defence consolidated reply, annex B, paras 1-16.

⁶⁵ With respect to item 3, 5D252 MFI, the Sabra Defence submits that it based its table on call data records obtained also from the Ogero (Kalam card) telecommunication company. *See* Sabra Defence consolidated reply, annex B, para. 40.

⁶⁶ *See* transcript of 20 July 2015, p. 40; transcript of 14 September 2015, pp 14-15, 23, 49, 73-74.

⁶⁷ Sabra Defence motion, annex A, items 3-4, 48; Sabra Defence consolidated reply, paras 6-10, 13, annex A, 'Sabra motion three', items 3-4, 48, annex B, paras 1-19, 40-48.

creating the tables is insufficient. The Trial Chamber cannot properly verify the tables' reliability absent a witness statement from the creator and the possibility of cross-examining the creator.⁶⁸

44. The Prosecution also objects to the Sabra Defence submissions on the relevance of these three call sequence tables, in particular arguing that it continues to attribute, incorrectly and without support, the specific number to Mr Zaaroura, while this number was used as a payphone in a shop and thus is anonymous by nature.⁶⁹

Decision

45. The Sabra Defence first introduced two of the call sequence tables⁷⁰ during its cross-examination of Mr Macleod. The Trial Chamber marked the tables for identification as exhibits 5D252 MFI and 5D253 MFI after counsel for Mr Sabra questioned Mr Macleod on these tables and calls from Mr Zaaroura to the Abu Adass home landline on 16 January 2005.⁷¹ The third call sequence table has not been marked for identification.⁷²

46. The Trial Chamber denied the admission of similar tables tendered by the Sabra Defence in the 25 September 2017 decision. The Sabra Defence had not submitted any evidence concerning how it had attributed numbers to specific people, and the Trial Chamber therefore found that the tables did not meet the reliability standard required for admission—but stated that it was prepared to revisit the matter should the Sabra Defence properly address it.⁷³ For the same reasons set out in the decision of 25 September 2017 and the decision on the second Sabra Defence motion, the Trial Chamber finds the Defence explanation of its attribution process or its methodology for creating the tables insufficient.⁷⁴ For these reasons, the Trial Chamber denies the admission into evidence of the three call sequence tables. The Trial Chamber, however, is prepared to revisit this if the Defence properly addresses this issue.

⁶⁸ Prosecution consolidated response, para. 11; Prosecution consolidated sur-reply, paras 19-31, 33-37, annex A, 'Sabra Motion Three', items 3-4, 48.

⁶⁹ Prosecution consolidated response, annex A, 'Sabra Motion Three', items 3-4, 48.

⁷⁰ Sabra Defence motion, annex A, items 3-4.

⁷¹ Transcript of 14 July 2016, pp 34-54.

⁷² Sabra Defence motion, annex A, item 48.

⁷³ 25 September 2017 decision, paras 125-135, disposition.

⁷⁴ 25 September 2017 decision, paras 125-135, disposition; Decision on second Sabra Defence motion, para. 34.

*Newspaper article**Submissions*

47. Finally, the Sabra Defence tenders a newspaper article from *Asharq Al-Awsat* newspaper dated 23 September 2004, disclosed to it by the Prosecution, which it argues is probative of and relevant to show the connections between Mr Mikati, Mr Khatib, and Mr Al-Saneh as those responsible for the Italian embassy plot.⁷⁵

48. The Prosecution objects to the admission of the document challenging its reliability and relevance. It argues that the article does not have *prima facie* reliability independent of the source information described in it. It also lacks the requisite relevance and probative value as it does not refer to Mr Al-Saneh or an attempt on Mr Hariri's life, as submitted by the Sabra Defence, and it also refers to other 'targets of the network' beyond the Italian embassy. Moreover, it is unclear why the Sabra Defence seeks to admit a 27-page document (in its English translation) in order to rely on a two-page article. Furthermore, two pages of the English translation are incorrectly translated.⁷⁶

Decision

49. The newspaper article does not refer to Mr Al-Saneh, and its relevant to Mr Hariri's assassination is unclear. As it lacks relevance it will not be admitted into evidence.

CONFIDENTIALITY

50. The Sabra Defence filed its motion and reply confidentially, but requests the Trial Chamber to file its decision as public and to reclassify its motion and reply as public, subject to any Prosecution requests for redactions.⁷⁷ The Prosecution filed its response and sur-reply confidentially and raised concerns related to reclassifying the Defence filings as public.⁷⁸

51. The Trial Chamber reiterates the principle of the public nature of proceedings before the Special Tribunal, and that documents should, wherever possible, be filed publicly. The Trial Chamber issues this decision publicly and incorporates information from the Parties' confidential submissions as necessary to determine the admissibility of the documents. It orders the Parties to file public redacted versions of their filings or have them reclassified as

⁷⁵ Sabra Defence motion, annex A, item 34.

⁷⁶ Prosecution consolidated response, annex A, 'Sabra Motion Three', item 34.

⁷⁷ Sabra Defence motion, para. 61; Sabra Defence consolidated reply, paras 21-22.

⁷⁸ Prosecution consolidated response, paras 22-25; Prosecution consolidated sur-reply, para. 38.

public, and urges the Parties to cooperate in this regard. The Trial Chamber will maintain the confidentiality of the annexes to the Sabra Defence motion for the same reasons as in its decision on the second Sabra Defence motion.⁷⁹

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DECLARES admissible, under Rule 154 and in accordance with paragraphs 28, 31, 34-35 and 39-40 of this decision, the following items, which it will formally admit into evidence at a suitable time in the proceedings:

- **item 1:** a Lebanese response to a UNIIC request for assistance dated 6 March 2006;
- **item 6:** a report of the Syrian Military Intelligence in Lebanon dated 18 September 2004;
- **item 15:** a one-page extract of the Lebanese military police report (**ERN 60002155T**);
- **item 24:** a UNIIC memorandum dated 14 August 2006;
- **item 30:** the relevant portions of the Lebanese military court record (**ERN 60013739-60013740, 60013742, 60013744, 60013746, 60013748, 60013754, 60013770, 60013772-60013773, 60013781-60013788, 60013800, 60013811-60013812**); and
- **item 35:** the relevant portions of the file of the Syrian Military Intelligence in Lebanon (**ERN 60026476, 60026478-60026479, 60026488-60026489**);

DENIES the Sabra Defence motion in all other respects, including the admission of witness statements and the Trial Chamber's exercise of its powers under Rules 92 and 165;

ORDERS the Prosecution and counsel for Mr Sabra to file public redacted versions of their filings, or to have them reclassified as public; and

MAINTAINS the confidentiality of the annexes to the Sabra Defence motion.

⁷⁹ Decision on second Sabra Defence motion, para. 56.

Done in Arabic, English, and French, the English version being authoritative.

Leidschendam,
The Netherlands
30 November 2017

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

